IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1378

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA LINE, LTD.; AND YAMASHITA-SHINNIHON STEAMSHIP CO., LTD., *Appellants,*

v.

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; AND CITY OF LONG BEACH, *Appellees.*

On Appeal from the Supreme Court of the State of California

BRIEF OF AMICUS CURIAE

Aer Lingus, Aerolineas Argentinas, Aeromexico, AeroPeru, Air Canada, Air France, Air New Zealand, Air Panama, Avianca, British Airways, BCAL, CP Air, China Airlines, Ecuatoriana, El Al, Iberia, Icelandic, Japan Air Lines, KLM, Korean Air Lines, Laker Airways, LAN Chile, Lufthansa German Airlines, Mexicana, Pakistan International Airlines, Philippine Airlines, Qantas, Sabena, SAS, Singapore Airlines, Swissair, UTA, Varig, *Amici Curiae*

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THE INTEREST OF THE AMICI IN THIS PROCEEDING

This case presents an appeal from a decision of the California supreme court which dictates the abandonment of an established international taxing pattern

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*Popular names. Legal names omitted to conserve space.

that has been built on the foundation of the Court's Home Port doctrine enunciated 123 years ago. The court below held that foreign-owned and based sea-going cargo containers are subject to California ad valorem personal property tax, thereby threatening to erode seriously, if not destroy, the long-standing rule, first approved by this Court in the case of *Hays v. Pacific Mail Steam-ship Co.*, 58 U.S. (17 How.) 596 (1855), that vessels and other instrumentalities of international transport are subject to tax only in their "home port".

The parties to this Brief are 33 foreign air carriers (the Amici) organized and operating under the laws of foreign countries, who provide air transportation services continuously and regularly between points in foreign countries and points within the United States.[1] Appellant and Appellees have consented to their appearance, which consent has been filed with the Clerk of the Court. The Amici fully support the position of Appellants in this case.

This proceeding is of direct interest to those Amici who serve California to the extent that the affirmation of California's right to impose a personal property tax on containers, owned by foreign shipping lines, temporarily present in California is viewed by that

[1] At this time at least 19 foreign flag carriers, including a majority of the Amici, regularly land and take off from airports located within the State of California. In addition, more than 75 foreign air carriers have authority to serve airports in twenty of the states. Most foreign air carriers, including the Amici, operate under bilateral air transport service agreements between their governments and the government of the United States. In all cases these agreements provide for reciprocal rights for United States airlines. The Amici are engaged solely in foreign commerce, being prohibited by treaty and statute from engaging in domestic air commerce.

State as laying the groundwork for a tax on foreign aircraft which land, layover and depart California in the course of providing solely international air transportation. Prompted by and based on the decision below, the California State Board of Equalization has publicly proposed amendments to its regulations to apply an apportioned property tax to foreign aircraft; action on this proposal is pending (Appendix I). It is of interest to those Amici who serve other states to the extent that it would be a precedent for a similar tax in other states.

This case presents an issue of grave concern to the future of all international commerce. *Hays*, enunciating the Home Port doctrine, represents the implementation by the United States of uniformly adopted international law and practice which has existed, in the case of ships, for centuries, and in the case of aircraft and containers, since they were invented. If the decision of the court below is affirmed, it will represent the first instance in modern times that a major commercial nation has sanctioned the imposition of a property tax on the instrumentalities of foreign commerce owned and operated by foreign persons.

It is the position of the Amici that the decision below should not be allowed to stand and that the Home Port doctrine should be reaffirmed as to all foreign instrumentalities of international transportation. Alternatively, if the Court sustains the decision below with respect to containers involved in the appeal, its decision should note the distinguishing characteristics of ships and aircraft which require a different result.

A decision in this case sustaining the Court below and not confined to cargo containers would have far reaching consequences to the Amici:

1. It could determine the property tax liability on aircraft of all foreign air carriers serving California—California has already proposed such a tax (Appendix I).

2. It could determine the right of all other states to impose property taxes on aircraft of foreign air carriers landing and departing within their borders—other states are already contemplating the imposition of similar taxes.[2]

3. It could determine the degree to which foreign nations will consider the adoption of retaliatory measures against U.S. air carriers operating within their borders—several friendly foreign governments have formally raised the likelihood of retaliation (Appendix II).

The prospect of retaliation is not only real but substantial. All aircraft of Amici are fully taxed or subject to tax in the country of their registration. At this time, to the knowledge of Amici, no country, *including the United States,* imposes a personal property tax on aircraft based in another country. At this time at least 12 airlines organized and operating under the laws of the United States are providing scheduled passenger and cargo service by air to approximately 62 foreign countries comprising at least 300 flights per week. In addition to scheduled services, substantial international charter operations are performed by U.S. air carriers. These flights are conducted with the use of high value, modern jet aircraft. The Air Transport Association

[2] Brief of Sea Land Services, Inc. as amicus curiae filed on June 12, 1978, pp. 3-4.

has estimated that a single Boeing 747 operating daily to only a single foreign country would incur a tax of $151,000 per year at Los Angeles tax rates.

Thus it would appear that suddenly the international taxing pattern is traumatically transformed from one of reciprocal exemption to reciprocal taxation. Assuming, *arguendo,* that taxation represents a Constitutionally permissable alternative, the choice under the Constitution is for the federal government to make. It is not the prerogative of a single state to take unilateral action precipitating a domino effect that reverses centuries of international practice and understandings.

The subject matter of this case, despite its superficial cloak as a local tax dispute, is a matter of exclusively federal concern. This is not a run of the mill quarrel as to whether there are sufficient state contacts to sustain a reasonably apportioned tax. It involves basic questions of state interference with the conduct of foreign relations and regulation of international shipping and aviation. The issues are so permeated with dominant federal interests that they permit of only a federal solution. Questions are raised under the Supremacy Clause, the Commerce Clause, the Import-Export Clause and Prohibition Against Tonnage Duties Clause of the Constitution.

This matter poses Constitutional issues of the greatest importance and has attracted wide interest nationally and internationally. Embassies of 12 foreign nations have filed Notes of concern with the U.S. Department of State (Appendix II).[3] We are advised

[3] The diplomatic Notes, which are set forth in full in Appendix II, are reprinted with permission of the respective Embassies and the U. S. Department of State.

that the Solicitor General is filing a brief in support of Appellants' position as is the Air Transport Association comprised of domestic U.S. air carriers. The Office of Special Representative For Trade Negotiations has expressed its opposition to the result below.[4] Other organizations, foreign and domestic, may request leave to file briefs with the Court. Should the present worldwide discipline of the Home Port tax doctrine crumble, it is, of course, not possible to predict the eventual consequences. The Amici, being international airlines which serve nations of every conceivable political, economic and social persuasion, are ultimately concerned that a regime of uncontrolled multiple international taxation of aircraft and other instruments of international commerce could result. In the words of the California supreme court in *SAS* v. *County of Los Angeles,* 56 Cal. 2d 11, 42; 363 P.2d 25, 44; 14 Cal. Rptr. 25, 44 (1961), *cert. denied,* 368 U.S. 899 (1961), the "repercussions would be world wide."

In the event the Court does not consider an appeal under Title 28 United States Code, Section 1257(2) to lie as a matter of right, this Court is urged to treat the proceeding as a petition for a Writ of Certiorari pursuant to Title 28 United States Code, Section 2103 and to consider this Brief in support of the grant of a Writ of Certiorari and in support of the position of the Appellants on the merits.

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[4] See Appendix E of Appellant's Jurisdictional Statement.

ARGUMENT

I.

THE *HAYS* CASE REMAINS THE LAW IN THE ABSENCE OF CONTRARY CONGRESSIONAL ACTION.

The case of *Hays* v. *Pacific Mail Steam-ship Co.,* 58 U.S. (17 How.) 596 (1855) states the law of this case. For 123 years this decision has stood for the proposition that a state is without power to impose an ad valorem tax on instrumentalities of foreign commerce, owned and based in foreign countries.[5] It has become part of the fabric of the law regulating foreign commerce and international relations—and the Congress by its failure to affirmatively act to alter the rule has acquiesced therein. The decision of the California supreme court in *SAS* v. *County of Los Angeles,* 56 Cal. 2d 11, 363 P.2d 25, 14 Cal. Rptr. 25, (1961), *cert. denied,* 368 U.S. 899 (1961), a plain unequivocal restatement of the *Hays* decision, as applied to foreign based aircraft, presented the Congress, as well as this Court, with an opportunity to review the issue and it has not chosen to do so. Considering that the issue stands at the very intersection of three primary federal interests—foreign relations, foreign commerce, and aviation and shipping, and in view of the position taken by the Solicitor General on behalf of the United States, it is a particularly inappropriate subject for unilateral state action.

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[5] *Ayer & Lord Tie Co.* v. *Kentucky,* 202 U.S. 409 (1906); *Louisville & Jeffersonville Ferry Co.* v. *Kentucky,* 188 U.S. 385 (1903); *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U.S. 196 (1885); *Morgan* v. *Parham,* 83 U.S. (16 Wall.) 471 (1873).

The drastic change which the present California supreme court would visit upon the law was prophetically deplored by that court in *SAS* when it stated:

> "If, during the 185 years of existence of the United States [a foreign instrumentality of commerce] has been assumed to be nontaxable, it makes little difference whether that belief stemmed from constitutional prohibitions or from considerations of policy. If such assumption were now to be overuled, we would open the doors to state taxation of every ocean vessel which, for 185 years has been believed to be nontaxable. *The repercussions would be world wide.* Retaliatory taxation would be inevitable. The states could not cope with such a situation. . ." *SAS, supra* 56 Cal.2d at 42, 363 P.2d at 44, 14 Cal. Rptr. at 44. (emphasis added)

The rule in the *Hays* was so well established that California, like other coastal states, has, by its own law, disclaimed the power of taxing ocean-going vessels home-ported in the state.[6] In *Ott v. Mississippi Valley Barge Line Co.,* 336 U.S. 169, 173-74 (1949) this Court left unimpaired the established rule that the tax situs of instrumentalities of foreign commerce is located only in the jurisdiction where they are based. The Court was unwilling to embark on foreign waters and presuppose that the apportionment rule on which state taxation of interstate commerce is based would work in the case of foreign commerce. The Court allows apportioned state taxes, being secure in the knowledge that it may, as an arbiter between national and local

[6] CAL. CONST. art. XIII, § 3(*l*); cf. e.g., N.Y. TAX LAW § 3 (McKinney 1959); MD. TAX. & REV. CODE ANN. § 9(A) (Cum. Supp. 1977); LA. CONST. art. 7, § 21.

interests, prevent multiple burdens on interstate commerce. Neither the Court, nor any other tribunal, however, can act as an arbiter of overlapping national tax schemes fracturing and burdening international trade.[7] Wisely the Court in *Ott* was willing to leave standing the view expressed in *Hays* that instruments of commerce do not lose "their national character nor their home ports" as they move from port to port. *Hays, supra* at 599.

Hays not only stands for a proposition of domestic law, but also constitutes compliance by the United States with a customary principle of international law that is embedded in the web of its international commitments discussed in Section II of this brief.

II.

FOREIGN INSTRUMENTALITIES OF COMMERCE ARE IMMUNE FROM LOCAL PROPERTY TAXES INCONSISTENT WITH THE GOALS OF THE FEDERAL GOVERNMENT IN ITS CONDUCT OF FOREIGN AFFAIRS AND REGULATION OF FOREIGN COMMERCE.

1. The Imposition of This Tax Infringes on the Exclusive Power of the Federal Government to Control External Affairs.

The action of the local authorities under review here constitutes a clear trespass on the paramount power of

[7] This Court in permitting the states to intrude into the area of regulating interstate commerce has emphasized that as an arbiter it may reconcile national and local interests and prevent multiple and unreasonable burdens to interstate commerce. See, e.g. *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 769 (1945). Thus, in *Standard Oil Co.* v. *Peck,* 342 U.S. 382 (1952), the court required the state of the home port of a vessel used in interstate commerce to apportion its tax in order to avoid multiple tax burdens on interstate commerce. At the same time this Court appreciates that it does not sit in a like capacity as impartial arbiter when acts of a foreign official or state are involved. See, e.g., *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 415 (fn. 17) (1964).

the federal government to conduct the external affairs of the United States. The action violates a modus vivendi established between the United States and the international air transport community, and also specific treaty commitments, and it will frustrate clearly defined foreign policy objectives of the United States. Federal foreign policy requires the application of the Home Port doctrine to instrumentalities of foreign commerce. It is axiomatic that the federal government was brought into being to assure a national and not parochial conduct of foreign affairs and a uniform regulation of foreign commerce. The states have no role in this area and are required, by the Supremacy Clause, to subordinate their laws, judicial decisions, and actions to the requirements of a uniform and effective national foreign policy. The United States must speak with one voice in these matters or it cannot credibly speak at all.[9]

The vesting of paramount power over foreign affairs in the national government not only forecloses a state from conducting its own foreign affairs but also requires a state to subordinate to the national interest its policies in areas where the local interests are usually primary. Thus, where a national interest approaches "the first magnitude", the President with the consent of the Senate may by treaty set aside local laws regulating game birds. *Missouri* v. *Holland,* 252 U.S. 416, 435 (1920). By the less formal means of "a protocol, a modus vivendi, a postal convention" or an exchange of correspondence with another nation, a

[9] See THE FEDERALIST No. 22 (A. Hamilton); *Brown* v. *Maryland,* 25 U.S. (12 Wheat.) 419, 445-46 (1827); *Mobile County* v. *Kimball,* 102 U.S. 691 (1881); See THE FEDERALIST No. 42 (J. Madison); *Inman Steamship Co.* v. *Tinker,* 94 U.S. 238, 245 (1877); *Zschernig* v. *Miller,* 389 U.S. 429, 440 (1968).

state may be compelled to defer to international policy in a peculiarly local area such as that of insurance regulation. See *United States* v. *Belmont,* 301 U.S. 324, 330 (1937); see also *United States* v. *Pink,* 315 U.S. 203, 233-34 (1942). Even without the necessity of prior action by the national government, a state probate law becomes unenforceable when something more than an "indirect" or "incidental" effect on foreign relations is threatened, since in such a case "international controversies of the gravest moment could result" even though a wrong is "imagined" and not "real". See *Zschernig, supra* note 8. In that case the Court said at pages 440-41:

> "It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way . . . The present Oregon law is not as gross an intrusion in the federal domain as those others might be. Yet, as we have said, it had a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems."

Applying these principles to the case at hand, a federal interest in foreign policy, which the states must respect, can be perceived in:

(a) an unbroken, publicly stated, course of conduct over 202 years,

(b) international conventions and understandings, and

(c) a serious threat posed to harmonious commercial relationships throughout the world.

Each of these points merits elaboration.

(a) The United States has pursued a course of conduct over the 202 years of the existence of this repub-

lic, embodied in *Hays,* which prohibited the tax under consideration here. Foreign governments, in structuring their aviation and shipping relationships with this country have justifiably relied on this statement of the U.S. position. (See Appendix II). The undisputed fact that no state has heretofore imposed or been permitted to impose such a tax clearly created *expectations* abroad which became a premise of foreign countries conduct towards U.S. carriers. In the words of the Court in *Belmont, supra* at 330, a "modus vivendi" has been established which is violated by California's action here.

(b) There are specific international agreements to which the United States is a party which reinforce this conclusion. Appellants have briefed in detail the basic treaties of Friendship, Commerce, and Navigation as well as the more specialized treaties, including the Customs Convention On Containers, applicable to the Appellants, that are designed to avoid double taxation that would impede or burden international commerce. There are analogous treaties and agreements affecting international air commerce.[9]

The United States is a party to an umbrella treaty covering contemporary civil aviation—the Chicago Convention of 1944.[10] Two articles of the Chicago Con-

[9] The Convention for the Unification of Certain Rules Relating to International Transportation by Air With Additional Protocol (Warsaw Convention) October 12, 1929, 49 Stat. 3000, T.S. No. 876, 147 L.N.T.S. 11; The International Air Services Transit Agreement, December 7, 1944, 59 Stat. 1693, E.A.S. No. 487, 84 U.N.T.S. 389; The Convention on Offenses And Certain Other Acts Committed On Board Aircraft, Sept. 14, 1963; 20 U. S. T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219.

[10] Convention on International Civil Aviation (Chicago Convention) December 7, 1944, 59 Stat. 1516, E.A.S. No. 469, 15 U.N.T.S. 295.

vention are of particular interest. Article 15 dealing with "airport and similar charges" provides in pertinent part as follows:

> "No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon".

Article 24 dealing with customs duties reads in part as follows:

> "Aircraft on a flight to, from, or across the territory of another contracting State shall be admitted temporarily free of duty, subject to the customs regulations of the State. Fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting State, on arrival in the territory of another contracting State and retained on board on leaving the territory of that State shall be exempt from customs duty, inspection fees or similar national or local duties and charges".

The scheme of the Convention is clear. Under Article 15 "fees, dues or other charges are not to be imposed on right of transit over entry into or exit from the territory of a contracting state by aircraft of another contracting state". Article 24 states in plain words that aircraft of one contracting state are to be admitted to the other contracting state free of duty. The same restriction can be found in the various bilateral air transport agreements.[11] Thus aircraft employed in international air commerce like cargo containers used in international water commerce have been relieved from duties by Act of Congress.[12]

[11] For example: Agreement for Air Transport Services, March 27, 1946, United States-France, 61 Stat.(4) 3445, T.I.A.S. No.

There can be little doubt that the terms "duties", "fees", "dues", or "other charges" are used in the broadest sense so as to include ad valorem property taxes. The authentic French and Spanish versions of Article 15 use the words "taxes" and "impuestos", respectively.[13] When California asserts a *right* to tax solely by reason of an "entry into" and "exit from" its boundaries, and *in large measure determines the values to be taxed by these factors,* there is little doubt that such charges are incompatible with U.S. treaty commitments and federal legislative and administrative action.[14]

Any trace of doubt remaining as to the meaning of these actions of the national government was surely dissipated by Section III of the Resolution of the Council of the International Civil Aviation Organization (ICAO)[15] adopted in 1966 which provides, in part, as follows:

1679; Agreement for Air Transport Services, December 27, 1946, United States-Peru, 61 Stat.(3) 2586, T.I.A.S. No. 1587; Agreement for Air Transport Services, December 16, 1944, United States-Sweden, 58 Stat. 1466, E.A.S. No. 431; Agreement for Air Transport Services, February 11, 1946, United States-United Kingdom, 60 Stat. 1499, T.I.A.S. No. 1507.

[12] Tariff Act of 1930, § 322, 19 U.S.C. § 1322 (1970).

[13] Protocol on the Authentic Trilingual Text of the Convention on International Civil Aviation, October 17, 1968, 19 U.S.T. 7693, T.I.A.S. No. 6605, 740 U.N.T.S. 21.

[14] This California charge is not only preempted by the national policy exempting foreign aircraft from duties, but also constitutes an additional landing charge that dilutes the national policy of discouraging such burdens on foreign air commerce. International Air Transportation Fair Competitive Practices Act of 1974, § 2, 49 U.S.C. § 1159a (1970).

[15] ICAO was authorized and created by the Chicago Convention in Part II, Articles 43 through 66. It has broad objectives (Article

"The Council Resolves That:

(1) Each Contracting State shall, to the fullest extent, grant reciprocally

* * *

(b) exemption from property taxes, and capital levies or other similar taxes, on aircraft of other Contracting States engaged in international transport".

The United States in its reply to ICAO's request for a report regarding the above quoted Resolution stated:

> "The United States is in accord with the principles set forth in the clause and, in accordance with its existing laws, *has for a long period of time followed the practice of granting the exemption provided in this clause* through bilateral agreements with other countries, or, in appropriate cases by means of administrative rulings." (emphasis added)

This reply only confirmed to foreign nations what they had always believed to be the case; it appeared to allay the need for a "new initiative".[16] The Chicago

44) designed to promote, encourage and regulate international air transportation. Many of its functions are delegated to its Council (Articles 50 through 55). The Council's mandatory functions include setting international standards (54(*l*)) and the consideration of any matters relating to the Convention referred to it (Article 54(n)). Pursuant to the Convention, the 15th Session of the ICAO Assembly (composed of all members) meeting in June-July, 1965, instructed the Council to "review the compliance with its Resolutions and recommendations dealing with the problems of the avoidance of multiple taxation and explore, if necessary, on the basis of the latest information from the Contracting States, the possibility of a *new initiative* in this field". (emphasis added).

[16] See footnote 15; see also, Section III, the U. S. reply, and the Council's commentary, on the Resolution, which are reprinted in full in Appendix III.

Convention was negotiated when there was no doubt that this Court, in determining the Constitutional limits of the states' jurisdiction to tax, had accepted the Home Port doctrine. The rule has been universally observed by U.S. trading partners. Congress, in exercise of its power over foreign commerce, has not modified this rule. But on the contrary Congress has exempted foreign based containers and aircraft from duties when they enter the U.S. as instrumentalities of commerce. See note 12, *supra*.

The Court has made abundantly clear in ***McGoldrick* v. *Gulf Oil Corp.*,** 309 U.S. 414 (1939) that enactment by Congress of customs duties as an exercise of its exclusive power to lay duties on imports under Article I, Section 8, Clause 3 of the Constitution may also constitute a regulation of foreign commerce that preempts the power of the state to impose a tax of general application. It is unnecessary for preemption that the state tax be labeled a customs duty, for, in *McGoldrick,* a New York sales tax with general application like the California ad valorem tax here involved, was preempted by the action of the national government in determining the extent to which property would be subject to or exempted from a duty.

(c) Finally, the disruption by California of a well-settled mode of international taxation threatens worldwide commercial relations. The diplomatic Notes included in Appendix II of this Brief, confirm that the decision of the court below has distressed U.S. trading partners. These Notes, as well as the fears expressed in companion briefs, including the brief of the Solicitor-General, confirm that the anxieties expressed about "worldwide repercussions" by the California Supreme court in the *SAS* case were well taken. Given the fact

that the federal government has provided unmistakable indications to its trading partners that foreign instrumentalities of commerce would be permitted to arrive, layover and depart the United States without imposition of any taxes upon such acts, no one should be surprised by the distress of those trading partners (See, notes 9, 10, 11, *supra.*) They had every reason to believe that, given the pervasive national interest in fostering international air and sea commerce, there was no residual power in California to affect such commerce. See *Hines* v. *Davidowitz,* 312 U.S. 52, 67-68 (1941).[17] The intrusive effect on foreign affairs that concerned the court in *Zschernig supra* note 8, is unquestionably presented by California's ad valorem tax on foreign instrumentalities of commerce. The threat of retaliatory taxes directed solely at American aircraft threatens an unravelling of the reciprocal arrangements by which international air commerce has been developed.

Among the vital objectives of U.S. foreign policy which are unrelated to the taxation of interstate commerce, is the interest of the federal government in assuring reciprocal treatment for United States owned instrumentalities abroad. The basis of international air

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[17] The California court in SAS fully appreciated that national action was not always required for preemption of state action by foreign policy considerations,

> "A reading of both the federal and state cases on the subject demonstrates that both courts have considered the subject to embrace a federal question without reference to any theory that it becomes such only when Congress pre-empts the field by enacting legislation. In fact, the basic decisions (both federal and state) have declared the "home-port" doctrine (and hence the invalidity of a proposed tax) although the federal legislature has never spoken on the subject."

SAS, supra, 56 Cal.2d at 21, 363 P.2d at 30, 14 Cal. Rptr. at 30.

commerce is reciprocity.[18] U.S. Courts are without power to deal with such matters when they arise in other countries. It is foreseeable, from the Embassy Notes included in Appendix II, that the result of California's action will be the retaliatory imposition by foreign countries of multiple property taxes on United States carriers without being limited by any rules of apportionment or equity. Compounding the problem is the fact that *only* United States carriers would be subjected to tax while other carriers would continue to enjoy exemption from the retaliating countries; and the ability of the United States government to protect its own carriers from the grossest form of discriminatory taxation abroad will be materially impaired.[19] While the naked threat of foreign retaliation is not a reason for limiting U.S. law, this Court last term acknowledged that, to avoid double taxation of foreign commerce, a principle of law has been adopted (as in *Hays*) upon which "foreign tax systems as well as private expectations [of every major trading nation in the world] . . . have been built" for 80 years, the principle should not be lightly disturbed. ***Zenith Radio Corp.* v. *United States*,** 46 U.S.L.W. 4752, 4756 (1978).

The prospect of substantial retaliation is real. For example, the Embassy of Mexico has advised the State Department:

> "Once the United States abandons the principle of reciprocal exemption from property taxation of aircraft, there is little reason other governments will have to refrain from imposing similar property taxes. No one stands to gain from such

[18] Chicago Convention, arts. 15, 24.

[19] The Notes of the Embassies of the Mexico and Netherlands make this very point. (see Appendix II pages II-17, II-22)

> an escalation of trade barriers as would come about, least of all carriers of the United States which would find themselves with aircraft subject to property tax in many foreign jurisdictions". Appendix II, p. II-20.

Similar sentiments are clearly apparent in other Notes reprinted in the Appendix.

The Court below, drawing heavily on the dissent in ***SAS, supra,*** refuses to consider the consequences of "double taxation from foreign authorities" and dismisses the problems created for international trade by suggesting that the national government may negotiate tax treaties providing for apportioned taxes if the burdens become too great.[20] It is astonishing that the court below should attempt to dictate the foreign policy of the United States from Sacramento and force the U.S. Department of State to try to persuade our trading partners to adopt an international apportioned tax scheme. Diplomatic Notes published in Appendix II indicate the cool reception such a proposal is certain to receive.

It is clear that the Constitution through its vesting of the foreign policy and foreign commerce power in the national government did not intend such consequences of the "first magnitude" to be triggered by the unilateral action of any state. ***Missouri* v. *Holland*, *supra*** at 435. See also, ***Cooley* v. *Board of Wardens*,** 54 U.S. (12 How.) 299 (1854).

[20] ***Japan Line, Ltd.* v. *County of Los Angeles*,** 20 Cal. 3d 180, 185; 571 P.2d 254, 257; 141 Cal. Rptr. 905, 908 (1977), which appears in Appendix A to Appellant's Jurisdictional Statement 6a. *See also* S.A.S., 56 Cal.2d 11, 43-49; 363 P.2d 44-48; 14 Cal. Rptr. 25, 44-48 (1961) (Traynor dissent).

2. International Law Forecloses Equating Tax Situs of Movable Instrumentalities of Commerce with Temporary Presence in a Jurisdiction.

It is established that ad valorem property taxes may not be assessed against property that is not present within the taxing jurisdiction; there must be opportunities, benefits, or protections conferred or afforded the property by the taxing state. *See Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435, 444-445 (1940). *Ott., supra* at 174. Notwithstanding that the situs of property may be established through use of an apportionment formula, mere presence of movable property within the taxing jurisdiction during the tax year if not substantially continuous will not suffice to establish a tax situs. *See Central Railroad* v. *Pennsylvania,* 370 U.S. 607 (1962). Despite the willingness of this Court to condone local formulae to ascertain the situs of movable property moving among the various states,[21] this Court has, when dealing with movable property based in foreign jurisdictions, considered itself bound by the prevailing principles of international law, absent a clear constitutional or statutory command to the contrary. *See McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 21 (1963) and cases cited therein. As we shall show, those principles have historically established the home port as the fixed and controlling situs of instrumentalities of commerce.

[21] *See Moorman Manufacturing Co.* v. *Blair,* 46 U.S.L.W. 4703, 4705 (June 15, 1978). *See also, Norfolk & W. Ry. Co.* v. *Missouri State Tax Comm'n,* 390 U. S. 317, 324 (1968); *General Motors Corp.* v. *Washington,* 377 U. S. 436 (1964) (Gross Receipts); *Illinois Cent. RR. Co.* v. *Minnesota,* 309 U. S. 157 (1940) (Gross Earnings); *Rowley* v. *Chicago & N.W. Ry. Co.,* 293 U. S. 102 (1934) (Multiple Factors); *Pullman Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18 (1891) (Track Mileage).

The ocean-going vessel is, of course, the instrumentality of commerce for which these principles were first established, but they apply with like force to aircraft. Long ago, it was decided that a vessel was deemed a part of the mass of property of the country under whose flag it sailed.[22] The United States has been a leading exponent of the view that, in a legal sense, a vessel constitutes a floating parcel of the nation to which it belongs, so that the criminal laws of that nation travel with the vessel on the high seas and from port to port.[23] Hence, this Court, when urged to extend the protection of the Jones Act to seamen serving on foreign flag vessels, rejected the view that "frequent and regular" contact of a vessel with United States ports entitled the United States to "exploit every such contact to the limits of its power," and the Court insisted upon the need for emphatic Congressional directions before creating "conflicting and overlapping" burdens on international trade. *Lauritzen, supra* note 22, at 581-82. A decade later, the Court again emphasized the need to forebear from engrafting salutary national policies upon the operation of foreign instrumentalities of commerce when it refused to extend the protection of national labor laws to seamen employed on foreign vessels calling frequently at United States ports. *McCulloch, supra.* These decisions are not isolated exercises of self-restraint in the sensitive area involving the manning of a vessel but continue the world view adopted at an early date by the

[22] See discussion of *United States* v. *Flores,* 289 U. S. 137 (1933) in *Lauritzen* v. *Larsen,* 345 U. S. 571, 585 (1953).

[23] *Flores, supra* note 22, at 155-159.

Supreme Court, confirmed in the *Hays* case as the basis for decision, and repeatedly reaffirmed thereafter.[24]

The *McCulloch* case demonstrates that contacts with the United States that are more significant than those of the Japan Line's containers in this case are insufficient justification for a transfer of a vessel from the mass of property of the country of its flag to a situs within the United States. In *McCulloch,* the ships were owned by Empresa Hondurena de Vapores, S.A., a wholly-owned subsidiary of United Fruit Company, a New Jersey corporation, primarily American-owned. The ships were time-chartered to United Fruit, which determined their cargoes, sailing schedules, and routings. The ships were engaged primarily in carrying bananas and other tropical produce between Central and South American ports and ports of the United States. The National Maritime Union had petitioned the NLRB to hold an election seeking to represent not only seamen working on Empresa ships, but also seamen working on ships belong to all subsidiaries of United Fruit.[25] Nonetheless, our national labor laws were not allowed to supplant those of the country where the vessel was home-ported.

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[24] As the Court said in ***M/S BREMEN*** v. ***Zapata Off-Shore Co.,*** 407 U.S. 1,9 (1972), "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts". See also, ***McLeod*** v. ***United States,*** 229 U.S. 416 (1913); ***The PAQUETE HABANA,*** 175 U.S. 677 (1900); ***Murray*** v. ***Schooner CHARMING BETSY,*** 6 U.S. (2 Chanch) 64 (1804).

[25] ***Sociedad Nacional de Marineros de Honduras*** v. ***McCulloch,*** 201 F. Supp. 82, 83 (D.C. D.C. 1962).

The California court, unlike this Court, refuses to recognize that for centuries international law has treated instrumentalities of commerce as sovereign parcels of the country whose flag they carry. This principle, as well as a treaty, protocol, modus vivendi, convention, or a correspondence between nations, constittutes an agreement among the nations. This Court has refused to ignore this principle when considering the application of national legislation to foreign instrumentalities of commerce, out of a concern that international trade would be materially dislocated in the very ways the court below believes irrelevant. See, *Lauritzen, supra,* at note 22. The decision of this Court in *Hays,* supra, together with the treaties and exchanges of correspondence, legislation, and administrative rulings already discussed, all of which respect foreign instrumentalities of commerce as being within the mass of property of the flag they bear and therefore without a tax situs in the United States, clearly demonstrate that California is without power to impose the tax upheld by the court below.

The essential error of the court below results from having viewed this case as involving the existence of a state power until Congress acts otherwise. On the contrary, the limitations on the state power urged by Appellants and Amici derive from the conduct of foreign affairs by the national government, federal legislation and administrative rulings, and the interstitial tissue of the Constitution. These limitations foreclose the tax imposed by California on foreign instrumentalities of commerce.

CONCLUSION

The decision of the court below should be reversed. In upholding a local tax on foreign owned containers it has both ignored the decision of this Court in *Hays* and the succeeding line of cases as well as trespassed upon a clearly defined field of exclusive federal jurisdiction. It is offensive to friendly foreign countries with whom this country has enjoyed amicable and profitable commercial relations, and if affirmed, would tend to seriously disrupt those relations. The reversal of the court below would be a reaffirmation of this Court's historic view of good international citizenship.

While the court below was concerned with a property tax on containers the Court should note that its decision might be controlling with respect to ships and aircraft as well. In the event the Court determines that the arguments urged in this brief do not apply to containers it should note the distinguishing characteristics which require a different result in the case of ships and aircraft.

Respectfully submitted,

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San Francisco, California 94111

Counsel for Amici

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Of Counsel

Appendix I

APPENDIX I

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 1799, SACRAMENTO, CALIFORNIA 95808)
(916) 445-3956

June 28, 1978

Mr. Garry J. Torre
Lilick, McHose, and Charles
Attorneys at Law
Two Embarcadero Center
San Francisco, CA 94111

Dear Mr. Torre:

This letter is in response to your request of June 14, 1978, to be kept informed on the status of the rule change concerning the taxability of foreign airlines we are contemplating as a result of the California Supreme Court decision in *Japan Line, Inc.* v. *County of Los Angeles,* 20 Cal. 3d 180. As you know, the proposed rule change was scheduled for a public hearing on June 29, 1978. We cancelled the public hearing for two major reasons: the task this Board faces in implementing Proposition 13 and the acceptance of jurisdiction by the U.S. Supreme Court of the *Japan Line* case. We do not know when the Board will be able to consider the proposed rule change, but it is conceivable that a public hearing could be held prior to the Supreme Court's determination of the case. When we reschedule the hearing on the proposed rule change you will be notified.

The purpose of the public hearing in such instances is to solicit views of people to be affected by the rule change. Therefore, we would be happy to consider any evidence submitted by you or your clients, whether it be by personal appearance or written brief.

Sincerely,

/s/ D. D Bell
Douglas D. Bell
Executive Secretary

STATE OF CALIFORNIA
STATE BOARD OF EQUALIZATION
1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 1799, SACRAMENTO, CALIFORNIA 95808)
916/445-6479

March 24, 1978

To County Assessors, County Counsels and Other Interested Parties:

Enclosed is a copy of a notice of public hearing to be held June 29, 1978, at 10:00 a.m. in Room 102, 1020 N Street, Sacramento, California on a proposed amendment to property tax Rule 202, Allocation of Aircraft of Certificated Air Carriers and Scheduled Air Taxi Operations.

The amendment extends the situs rule of subdivision (b) of Rule 202 to aircraft operated solely in foreign commerce. The Board's legal staff is of the opinion that two recent cases, Sea-Land Service v. County of Alameda, 12 Cal. 3d 772, and Japan Line, Ltd. v. County of Los Angeles, 23 Cal. 3d 180, have overturned the former rule that aircraft operated solely in foreign commerce are protected from state property taxation by the Home-Port Doctrine. These two cases hold that the Home-Port Doctrine does not shield property with situs in California from taxation on an apportioned basis. Because our property tax rules are merely declarative of existing law, we propose to amend Rule 202 to conform to these court decisions.

Written comments with respect to the enclosed notice are welcome and should be directed to me. If you wish to present testimony pertaining to the amendment at the hearing, please notify me by mail or telephone by June 14, 1978, so that an orderly agenda can be prepared.

Sincerely,

/s/ Janice Masterton
Janice Masterton
Calendar Clerk

NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE STATE BOARD OF EQUALIZATION

Notice is hereby given that the State Board of Equalization, pursuant to the authority vested by Section 15606 of the Government Code, and to implement, interpret or make specific Sections 1150 through 1156 of the Revenue and Taxation Code proposes to amend Section 202(b) of Article 5, Subchapter 2, Chapter 1, Title 18, of the California Administrative Code, as follows:

1. Amend Section 202, subsection (b), Article 5, subchapter 2, chapter 1 to read:

Rule No. 202. (Cal. Adm. Code) ALLOCATION OF AIRCRAFT OF CERTIFICATED AIR CARRIERS AND SCHEDULED AIR TAXI OPERATORS

(b) SITUS. Aircraft ~~of United States registry~~ operated by certificated air carriers (within the meaning of section 1150 of the Revenue and Taxation Code) or scheduled air taxis (within the meaning of subdivisions (a) and (b) of section 1154 of the Revenue and Taxation Code) and flown in intrastate, interstate, or foreign commerce shall be deemed to be situated only in those taxing agencies (within the meaning of section 404 of the Revenue and Taxation Code) in which the aircraft normally make physical contact. The physical contact must be intentional rather than by accident or as the result of an emergency, and it must involve embarking or disembarking of crew, passengers, or freight.

Aircraft flying over the state without landing do not acquire situs for property tax purposes. Conversely, the situs of aircraft that depart from a taxing agency within the state, fly out of the state, and return to the same or another taxing agency within the state without landing outside the state is within the state's taxing jurisdiction throughout the flight.

Situs for property tax purposes is not affected by the legal or commercial domicile of the operator of the aircraft, ~~except that Foreign-owned and based aircraft operated solely in Foreign Commerce do not acquire a situs within the State for property tax purposes~~ *nor by the fact that the aircraft is operated solely in foreign commerce.*

Notice is also given that any person interested may present statements or arguments orally or in writing relevant to the action proposed, at Room 102, Consumer Affairs Building, 1020 N Street, Sacramento, CA 95814 at 10:00 a.m. on June 29, 1978. The State Board of Equalization upon its own motion or at the instance of any interested person, may thereafter adopt the above proposed amendment substantially as set forth without further notice.

Upon request, copies of the above regulation may be obtained from:

State Board of Equalization
1020 N Street
Sacramento, California 95814

The State Board of Equalization, has determined that, pursuant to Section 2231 of the Revenue and Taxation Code, no increased costs or new costs to local government will result from this regulation.

Dated: March 15, 1978 STATE BOARD OF EQUALIZATION

/s/ GORDON P. ADELMAN
for DOUGLAS D. BELL
Executive Secretary

State of California

Board of Equalization

Property Tax Rules and Regulations

Chapter 1. State Board of Equalization—Property Tax
Subchapter 2. Assessment
Article 5. Situs

References: Sections 1150-1156, Revenue and Taxation Code

Rule 202. Allocation of Aircraft of Certificated Air Carriers and Scheduled Air Taxi Operators

(a) Air Taxis. An aircraft whose owner on the lien date used it in scheduled air taxi service at any time during the representative period selected pursuant to subsection (f), or which has been purchased for scheduled air taxi service but not yet put into such service and not yet used in any other service, is assessable under sections 1150 to 1156 of the Revenue and Taxation Code and not under Part 10, Division 1, or under other situs provisions of Part 2, Division 1, of the Revenue and Taxation Code.

(b) Situs. Aircraft operated by certificated air carriers (within the meaning of section 1150 of the Revenue and Taxation Code) or scheduled air taxis (within the meaning of subdivisions (a) and (b) of section 1154 of the Revenue and Taxation Code) and flown in intrastate, interstate, or foreign commerce shall be deemed to be situated only in those taxing agencies (within the meaning of section 404 of the Revenue and Taxation Code) in which the aircraft normally make physical contact. The physical contact must be intentional rather than by accident or as the result of an emergency, and it must involve embarking or disembarking of crew, passengers, or freight.

Aircraft flying over the state without landing do not acquire situs for property tax purposes. Conversely, the situs of aircraft that depart from a taxing agency within the

state, fly out of the state, and return to the same or another taxing agency within the state without landing outside the state is within the state's taxing jurisdiction throughout the flight.

Situs for property tax purposes is not affected by the legal or commercial domicile of the operator of the aircraft, ~~except that Foreign-owned and based aircraft operated solely in Foreign Commerce do not acquire a situs within the State for property tax purposes~~ *nor by the fact that the aircraft is operated solely in foreign commerce.*

(c) Allocation Formula. The allocation formula to be used by each assessor is composed of two factors: (1) ground and flight time and (2) aircraft arrivals and departures.

Time allocable to an airport is the amount of time that certificated aircraft and scheduled air taxis are on the ground at the airport, plus a portion of the incoming and outgoing flight time computed pursuant to subsection (d). The ratio of the time allocable to the airport during a representative period to the sum of the time allocable to the airport and the time allocable elsewhere is the ground and flight time factor. In computing the ground and flight time factor, the following shall be excluded:

Rule 202. Allocation of Aircraft of Certificated Air Carriers and Scheduled Air Taxi Operators. (Cont. 1)

From the time allocable to the airport—

(1) All ground and flight time prior to the aircraft's first entry into the revenue service of the air carrier in control of the aircraft on the current lien date.

(2) All ground time in excess of 12 consecutive hours at the airport following entry into revenue service.

From the total time—

(1) All ground and flight time prior to the aircraft's first entry into the revenue service of the air carrier in control of the aircraft on the current lien date.

This factor shall be multiplied by 75 percent to obtain a weighted ground and flight time factor.

The aircraft arrivals and departures factor is the ratio of the number of arrivals at and departures from an airport during a representative period to the total number of arrivals at and departures from all airports during the representative period. This factor shall be multiplied by 25 percent to obtain a weighted arrivals and departures factor.

The weighted time factor shall be added to the weighted arrivals and departures factor. The sum of the two weighted factors yields the allocation ratio to be applied to the full cash value of the aircraft to determine the full cash value allocable to the airport.

(d) Allocation of Flight Time. For aircraft flying from one California airport to another California airport, the flight time attributable to each airport is one-half the flight time between the airports.

For aircraft arriving from an airport outside the state or leaving for an airport outside the state, the flight time from or to the state boundary shall be allocated to the California airport in which the aircraft first lands or last takes off, as the case may be. The flight time to the state boundary shall be computed as follows: (1) determine the mileage from the airport to the state boundary crossing point on a great circle flight to the first landing point outside the state; (2) divide this mileage by the total great circle mileage from the airport to the first landing point outside the state; (3) multiply this percentage by the total flight time from the airport to the first landing point outside the state. The same procedure shall be used for inbound flights from outside the state. To allow for differences in take-off, landing and cruising speeds and for varying take-off and landing patterns, the time allocated to an airport shall not be less than five minutes for an incoming or an outgoing flight. In lieu of the actual flight time for a single flight, the average flight time between two ports, or between a port and the state line, for two or more flights of a single carrier or of more than one carrier shall be used when such an average is promulgated by the board unless the assessor has documented evidence which justifies departure from such average time.

(e) Sources of Allocation Data. For scheduled operations, arrivals and departures and ground and flight time shall be derived from the carrier's operating schedules. For nonscheduled operations, including but not limited to, overhaul, pilot training, charter, military contract flights, and standby services, ground and flight time and arrivals and departures shall be derived from the carrier's recorded operations.

(f) Representative Period. Annually, on or before February 15, the board shall consult with the assessors of the counties in which air carriers' aircraft normally make physical contact. On or before March 1, the board shall designate a representative period to be used by all assessors in accessing the aircraft of each carrier for the forthcoming fiscal year.

Rule 202. Allocation of Aircraft of Certificated Air Carriers and Scheduled Air Taxi Operators (Cont. 2)

(g) Application of Allocation Formula. The aircraft of certificated air carriers and scheduled air taxi operators shall be segregated by type, and a separate allocation ratio shall be computed for each type which has established a tax situs within the state, excluding those makes within a type which have not established a tax situs within the state. Each allocation ratio shall then be applied to the total value of the carrier's aircraft of each type to which the allocation

ratio applies, excluding those makes within a type which have not established a tax situs within the state.

The types are as follows:

(1) Piston-powered

(2) Turboprop-powered

(3) Helicopter

(4) Turbojet and Turbofan powered

(A) Two engine

(B) Three engine

(C) Four engine

(D) DC-8-60 series

(E) Boeing 747

(F) DC-10 and L 1011

History: Adopted March 9, 1967, effective March 10, 1967. Amended January 8, 1969, effective February 12, 1969.

Amended December 12, 1969, effective January 11, 1970.

Amended February 16, 1970, effective March 26, 1970.

Amended December 20, 1971, effective January 19, 1972.

Amended February 21, 1974, effective February 26, 1974.

Amended December 17, 1975, effective January 25, 1976.

Appendix II

APPENDIX II

California Property Tax

(Note to State Department)

June 19, 1978

The Canadian Embassy presents its compliments to the Department of State and has the honour to refer to a circular of the California State Board of Equalization dated March 24, 1978, pertaining to an amendment to the California Tax Regulations. The purpose of this amendment is to enable the State of California and the local county assessors of California to levy a personal property tax on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California.

The Canadian Embassy wishes to express the concern of the Canadian Government at the apparent inconsistency of this proposal with the Convention on International Civil Aviation to which both Canada and the United States are parties and of which Article 24 specifically states that "aircraft on a flight to, from, or across the territory of another Contracting State shall be admitted temporarily free of duty". It is the understanding of the Canadian Government that this exemption applies to any form of taxation, whether imposed by national or state authorities. It will also be noted that Article 15 of the same Convention stipulated that "no fees, dues or other charges shall be imposed by any Contracting State in respect only of the right of transit over or entry or exit from its territory for any aircraft".

The Government of Canada wishes furthermore to draw the attention of the Government of the United States to Section III of the ICAO Council Resolution of the taxation of income of international air transport enterprises and the taxation of aircraft, and particularly to paragraph 1(B) of that section, whereby "each Contracting State shall, to the fullest extent possible, grant reciprocally . . .

exemption from property taxes . . . on aircraft of other Contracting States engaged in international air transport". The Government of the United States will also recall its statement in that connection to that effect that it "is in accord with the principles set forth in this clause" and that it has "for a long period of time followed the practice of granting the exemptions provided for in this clause through bilateral agreement with other countries, or, in appropriate cases, by means of administrative ruling".

The Government of Canada wishes furthermore to refer to the Air Transport Agreement between Canada and the United States of January 17, 1966, as amended, and particularly to Article XI of that Agreement, which stipulates that "each Contracting Party shall exempt the designated airlines of the other Contracting Party to the fullest extent possible under its national law from import restrictions, customs duties, excise taxes, inspection fees and other national duties . . .". While this provision does not explicitly rule out a state-imposed property tax on Canadian aircraft used in international service, it will be clear that such a tax would negate the very intent of this provision and that it would introduce a new element in regard to the equitable exchange of benefits expected to be derived from that Agreement.

It will be apparent that the Canadian Government is concerned at the repercussions of a proposal, which, if enacted, would open the way to similar application by the authorities of other states. As, moreover, Canadian aircraft are already fully taxed in Canada, the application of such a tax by any state would result in double taxation, the effect of which would be to alter the present position of reciprocity. It is finally clear that the imposition of such a tax, in addition to introducing a potentially destabilizing factor in air relations, would place on foreign airlines, and in particular on Canadian airlines in view of the extensiveness of air service between our two countries, an additional

and substantial burden at a time when those airlines are engaged in making air travel more readily accessible to the travelling public.

The Government of Canada hopes that these concerns will be taken into account by the Government of the United States and that, should the intention of the California State Board of Equalization be confirmed, appropriate action would be taken by the Government of the United States of America to prevent the imposition of a property tax on foreign aircraft by the State of California.

The Canadian Embassy avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

The Embassies of Denmark, Norway and Sweden present their compliments to the Department of State and have the honour to refer the Department of State to a March 24, 1978 letter from the California State Board of Equalization (copy attached). Attached to this letter is a proposed amendment to the California Tax Regulations which would enable the State of California and the local county assessors of California to levy a personal property tax on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California.

The Governments of Denmark, Norway and Sweden submit that the imposition of a property tax on aircraft owned by foreign airlines operating into and out of California would be contrary to the obligations set forth in Articles 15 and 24 of the Convention on International Civil Aviation and the United States representations to the other Contracting States of the Convention with respect to the exemption from property taxes on aircraft engaged in international air transportation, as set forth in the Supplement to ICAO Document 8632-C/968. The attention is invited in particular to Clause (1) (B) Section III of the ICAO Document containing Council Resolution of 14 November 1966 on Taxation of the Income of International Air Transport Enterprises and on Taxation of Aircraft. In accordance with this Resolution, each Contracting State, were to notify ICAO of the extent to which it was prepared to take action in accordance with the principles of this Resolution. In this regard, the United States represented to the other Contracting States of ICAO that:

> "The United States is in accord with the principles set forth in this Clause and, in accordance with its existing laws, has for a long period of time followed the practice of granting the exemptions provided for in this Clause through bilateral agrements with other countries, or in appropriate cases, by means of administrative rulings".

The United States' statement then went on to declare that such agreements had been concluded today with several countries. Thus, it is the opinion of the Government of Denmark, Norway and Sweden that the United States has already adopted a policy of exempting aircraft which are engaged in international air transportation from the levy of any property tax within the United States.

The Governments of Denmark, Norway and Sweden would also like to note various policy factors which are relevant to this issue. Aircraft operating in international air transportation under the flag of Denmark, Norway or Sweden are already subject to full taxation in those countries. If a property tax were to be imposed by the United States or any individual State or political subdivision thereof, the aircraft would be doubly taxed. Such a double tax burden would be unfair to the air transport enterprises involved and would also be an impediment to the development of trade and travel between our countries. The avoidance of such a situation was the purpose for which Section III of the ICAO Council Resolution of 14 November 1966 was formulated and approved.

Furthermore, it seems clear to the Governments of Denmark, Norway and Sweden that the imposition of a property tax on the aircraft of non-U.S. airlines operated to and from the United States may lead to taxation of aircraft of U.S. airlines by foreign Governments and their local political subdivisions. No one stands to gain from such an escalation of trade barriers.

The Governments of Denmark, Norway and Sweden are deeply concerned with the possible international complications which could result if the State of California were to impose a property tax on foreign aircraft operated in foreign commerce. The Governments of Denmark, Norway and Sweden urge the Government of the United States to take immediate and appropriate action to prevent the imposition of a property tax on foreign aircraft by the State

of California in order to assure continued growth and development of trade and other relations between our countries.

Washington, D.C.

June 13, 1978

EMBASSY OF THE
FEDERAL REPUBLIC OF GERMANY
Washington, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to inform the Department of the following matter:

By circular letter, dated March 24, 1978 the California State Board of Equalization has expressed its intent to assess property taxes against foreign owned and operated aircraft employed in the foreign commerce of the United States and using facilities in California. A proposed Amendment to the California Tax Regulations is pending.

This Embassy has been instructed to express the strong concern of the Government of the Federal Republic of Germany that this tax if imposed will constitute an undue burden on and impediment to the flow of international such a result would be in contradiction to the intentions of traffic and Commerce and will be in violation of multilateral and bilateral international Commitments of the United States of America.

Article 24 of the "Chicago Convention" provides that aircraft of contracting parties be admitted temporarily to the territory of other contracting parties free of duty. Both the Federal Republic of Germany and the United States are parties to that convention.

It is the position of the Government of the Federal Republic of Germany that, as far as this provision is concerned, no difference can be made between State—or Federal Taxes—or duties in the United States. Article 24 is intended to facilitate international air transportation, its purpose would be destroyed if its commitment would only bind the federal authorities. It seems obvious that the contracting parties.

Furthermore, Paragraph 1 (b), Section III of the ICAO Council Resolution of November 14, 1966 requires that member countries grant each other exemption from property taxes for aircraft engaged in International Air Transportation on the basis of reciprocity. The Government of the United States informed ICAO that it adheres to this principle either by bilateral agreements or through administrative rulings. There are no taxes assessed against foreign Aircraft in the Federal Republic of Germany.

Article 7 of the Air Transport Agreement between the Federal Republic of Germany and the United States of America of July 7, 1955 stipulates that certain activities and transactions connected with the operation of German civil aircraft on the territory of the United States of America be exempted from duties, fees and charges. Aircraft as such are not mentioned in the Bilateral Agreement. This is due to the fact (as reflected by the proceedings of the negotiations in 1955) that both contracting parties agreed that the exemption of aircraft is covered by Article 24 of the Chicago Convention. An inclusion in the Bilateral Agreement was therefore considered not to be necessary.

This Embassy wishes to point out that the question whether the exemption of Article 7 applies only to Federal and not to State taxes in the USA has been disputed before. The Government of the Federal Republic of Germany wishes to reiterate its position that according to its interpretation of the Treaty, Federal, State and Local taxes are covered by the exemption.

The imposition of State Taxes on German aircraft in California would raise serious doubts whether the principle of reciprocity which governs the exemption of US-aircraft in the Federal Republic of Germany is still maintained and would lead to a reevaluation of that situation by German tax authorities. Furthermore, apart from the distortion of cost structures between airports the California tax example might induce other States to levy com-

parable taxes on foreign aircraft and eventually on other modes of international transportation as well. Retaliation by other countries might then subject international carriers to multiple taxation which would be clearly in contradiction to efforts to facilitate international Commerce.

Washington, D.C., June 23, 1978

TRANSLATION

June 28, 1978

The Embassy of France presents its compliments to the State Department and has the honor to state the following:

The Embassy of France has been informed of the California State Board of Equalization's intent to modify its fiscal regulations in order to enable it, as well as the local tax assessors, to levy a property tax on airplanes owned by foreign airlines which operate a commercial service to and from California. This intention was published by a circular letter from the California State Board of Equalization dated March 24, 1978.

The proposed tax would be imposed by the local fiscal authorities as well as the State of California's on aircraft assigned to international routes by foreign airlines, and would not be based on the cost of any services rendered.

French authorities would remind you that they do not impose, at any level, a similar tax on planes owned by foreign airlines, including American planes operating to and from France.

They thus feel that imposing this tax on aircraft owned by French companies would constitute a discrimination contrary to the provisions of the Protocol of signature of the Agreement between France and the United States of America and signed in Paris on March 27, 1946, with respect to airline services between their respective territories.

This Protocol stipulates:

"It appeared in the course of negotiations leading up to the conclusion of the agreement on air services between French territory and the territory of the United States of America signed at Paris today, that the representatives of the two contracting parties were in agreement on the following points:

1. The air carriers of the two contracting parties, operating on the routes described in the annex of said agreement shall have equal opportunity for the operation of the said routes".

The imposition of the proposed tax would lead to an imbalance in the existing double taxation agreements currently being negotiated between the two countries.

Consequently, the French authorities ask the American authorities that the French airlines be exempt from the scope of application of the proposed tax. They would recall to you, in the exchange of letters of July 29, 1967, annexed to the French-American Convention on income taxation, the U.S. government gave its assurance that it would intervene with such States, considering subjecting our airlines to local taxation, in exchange for the assurance that we would not subject American companies to taxation.

The French authorities also wish to call the attention of the American authorities to Section III, paragraph (B) of the Resolution of the Council of the ICAO dated November 14, 1966, which declares that "Each contracting state shall, to the fullest possible extent, grant reciprocally (B) the exemption from property taxes and capital levies or other similar taxes on aircraft of other Contracting States engaged in international air transport".

Following the adoption of this resolution, American authorities declared, in a precise and unequivocal manner, to the other Contracting States of the ICAO, that they were in accord with such principles and had, for a long time and conforming to their laws, granted the exemption provided for by this resolution through bilateral agreements with other countries or through appropriate administrative measures.

In addition, such a tax would be incompatible with the principle of non-discrimination established by the Chicago Convention, namely in Article 15 which specifically stipulated:

"No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon".

French authorities wish to emphasize that, if the imposition of this tax would be authorized, other States of the United States might also want to impose a similar tax. This would seriously increase the costs of operation of the French airlines—which are already taxed in France—to the detriment of not only those companies, but also the public.

Finally, they believe that the enforcement of such a tax, might lead to similar measures of taxation by local or national authorities of other foreign countries which would result in a hindrance to the development of air travel.

In the light of these observations, French authorities would appreciate it if the State Department would inform them on the measures which American authorities intend to take to prevent the State of California from imposing a property tax on foreign aircraft.

The French Embassy takes this occasion to renew its high consideration to the State Department.

EMBASSY OF JAPAN
WASHINGTON
July 20, 1978

AIDE-MEMOIRE

The Board of Equalization of the State of California has recently proposed an amendment to Section 202 of its Tax Regulation which would enable the State of California and its local county assessors to levy a local property tax on foreign aircraft engaged in air service to and from the State of California. With regard to the proposed tax, the Japanese Government invites the attention of the U.S. Government to the following points and hopes that, with a view to developing and maintaining smooth commercial relations between our two countries, the U.S. Government would take appropriate measures to prevent this taxation.

1. Article 24 of the Convention on International Civil Aviation, which stipulates mutual exemption of duties among contracting countries, and other articles of Chapter 4 of the Convention set forth measures to facilitate the smooth operation of international civil air transportation. This proposed taxation would be in contradiction to the fundamental concepts envisaged in Chapter 4 of the Convention because it would be a barrier to the smooth operation of international civil air transport services.

2. While Paragraph 1(b), Section III of the ICAO Council Resolution of November 14, 1966, requires that member countries grant each other exemption from property taxes for aircraft engaged in international air services and the U.S. Government, in this respect, explicitly announced that it would adhere to the principles set forth in this Resolution, it seems that the proposed tax would not go along with the spirit of the Resolution.

3. As to municipal taxes in Japan which correspond to the proposed tax, no such taxes are assessed at present against foreign aircraft in Japan. If this proposed tax is

implemented, an inconsistency would therefore be brought about between the two countries in connection with the imposition of taxes on foreign aircrafts. This situation could interfere with the smooth commerce between our two countries and, accordingly, the Japanese Government is deeply concerned about the future development of this matter.

The Embassy of the Republic of Korea presents its compliments to the Department of State and has the honour to refer to the letter of March 24, 1978 from the California State Board of Equalization, together with the proposed amendment to the California Tax Regulations which would enable the State of California and the local county assessors of California to levy a personal property tax on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California.

In this connection, the Embassy takes a serious view of the possible international complications which might result if the State of California were to impose a property tax on foreign aircraft operated in foreign commerce. Such action appears to contradict the United States treaty obligations set forth in Article 24 of the Convention on International Civil Aviation as well as Section III of the ICAO Council Resolution of 14 November 1966 on Taxation of the Income of International Air Transport Enterprises and on Taxation of Aircraft.

It is also noted that in the light of the principle of reciprocity underlying Article 11, paragraph 5 of the Treaty of Friendship, Commerce and Navigation between the Republic of Korea and the United States of America of 28 November 1957 which stipulates that each Party reserves the right to extend specific tax advantages on the basis of reciprocity, the imposition of such a tax burden on the Korean air transport enterprise seems to be extremely unfair and may impede the smooth development of trade and travel between the two countries.

In view of the above considerations, the Embassy respectfully urges the Government of the United States of America to take an appropriate action to prevent the imposition of a property tax on foreign-registered aircraft by the State of California in order to assure continued growth and development of trade and other co-operative relations between our two countries.

The Embassy of the Republic of Korea avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

August 16, 1978

Washington, D.C.

UNOFFICIAL TRANSLATION

The Embassy of Mexico presents its compliments to the Department of State and has the honor to refer the Department of State to a March 24, 1978 letter from the California State Board of Equalization (copy attached). Annexed to this letter is a proposed amendment to the California Tax Regulations which would enable the State of California and the local county assessors of California to levy a personal property tax on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California.

The Government of Mexico respectfully submits that the imposition of a property tax on aircraft owned by foreign airlines operating into and out of California would directly contravene the United States' treaty obligations set forth in Article 24 of the Convention on International Civil Aviation (the "Chicago Convention") and the United States' representations to the other Contracting States of the Convention with respect to the exemption from property taxes on aircraft engaged in international air transportation, as set forth in the supplement to ICAO Document 8632-C/968.

The Government of Mexico respectfully invites the attention of the Department of State to the language of Article 24 of the Chicago Convention which states that "aircraft on a flight to, from, or across territory of another contracting State are to be admitted temporarily free of duty . . ." In the considered opinion of the Government of Mexico, the exemption from "duty" provided by the Convention must necessarily include an exemption from property taxes, whether attempted to be imposed by the United States of America itself or by any individual State or political subdivision thereof. If this were not so, the exemption from "duty" would have little practical value or meaning.

The attention of the Department of State is also invited to Section III of the ICAO "Council Resolution of 14 November 1966 on Taxation of the Income of International

Air Transport Enterprises and on Taxation of Aircraft," and particularly Clause (1) (b) thereof, which states:

> "(1) *Each Contracting State shall,* to the fullest extent possible, *grant* reciprocally
>
> (b) *Exemption from property* tax, and capital levies or other similar taxes, *on aircraft of other Contracting States engaged in international air transport; . . .*" (Emphasis supplied).

In further accordance with this resolution, the Department of State is reminded that each Contracting State, including the United States, was to notify ICAO of the extent to which it was prepared to take action in accordance with the principles of this Resolution. In this regard, the United States specifically and unequivocally represented to the other Contracting States of ICAO that:

> "The United States is in accord with the principles set forth in this Clause and, in accordance with its existing laws, has for a long period of time followed the practice of granting the exemptions provided for in this Clause through bilateral agreements with other countries, or, in appropriate cases, by means of administrative rulings."

The United States' statement then declares that such agreements have been concluded today with over forty countries, including Mexico. Thus, it is respectfully the opinion of the Government of Mexico that the United States has already committed itself to a practice of exempting aircraft operating under the flag of Mexico and which are engaged in international air transportation from the levy of any property tax within the United States.

The Government of Mexico would also invite the Department of State's attention to the consideration of various policy factors which are necessarily germane to this issue:

First, aircraft operating in international air transportation under the flag of Mexico are already subject to full txation in Mexico. Thus, if property tax were to be imposed by the United States or any individual State or political subdivision thereof, the aircraft would thus be doubly taxed —by the Government of Mexico and also by the United States. Such a tax burden is both unfair to the air transport enterprises involved and also a frustrating, but preventable, impediment on the smooth development of trade and travel between our two countries. It is indeed the very purpose for which Section III of the ICAO Council Resolution of 14 November 1966 was formulated and approved.

In the particular case of Mexico and the United States, there is an agreement effected by exchange of notes signed at Washington August 7, 1964 and applicable with taxable years beginning on or after January 1st, 1964 for the relief from double taxation on earnings from operation of ships and aircraft, through reciprocal exemption.

Although the agreement only covers federal income taxes, we believe that the imposition of a tax on capital represented by the aircraft is of such analogous character that it would substantially violate the spirit of our agreement and consequently give rise to its possible termination according to point four of both exchange notes.

When the agreement was being negotiated, the Ministry of Foreign Affairs of Mexico specifically raised the issue of state or local authorities contravening the agreement by imposing taxes on ships and aircrafts, and although it was not inserted into the agreement, it was thought that the proper remedy for such violation would be the termination of the agreement.

Secondly, it seems clear to the Government of Mexico that the imposition of a property tax on the aircraft of non-U.S. airlines operated to or from the United States of America in foreign commerce could immediately lead to the taxation of aircraft of U.S. airlines by foreign govern-

ments and their local political subdivisions. Once the United States abandons the principle of reciprocal exemption from property taxation of aircraft, there is little reason other governments will have to refrain from imposing similar property taxes. No one stands to gain from such an escalation of trade barriers as would come about, least of all carriers of the United States which would find themselves with aircraft subject to property tax in many foreign jurisdictions.

The Government of Mexico is deeply concerned about the possible international complications which could result if the State of California were to impose a property tax on foreign aircraft operated in foreign commerce. The Government of Mexico respectfully urges the Government of the United States to take immediate and appropriate action to prevent the imposition of a property tax on foreign-registered aircraft by the State of California, in order to assure continued growth and development of trade and other relations between our two countries. This is specially important at a moment in which our two countries have just signed a new agreement in civil aeronautics that responds to the philosophy of both our Governments with respect to the substantial lowering of the rates for air transportation as an effective means of bringing our people together. The proposed tax by the State of California would set an ominous example to other local authorities and would certainly seem to negate the declared international policy of the Carter Administration with respect to the elimination of non-tariff trade barriers.

The Embassy of Mexico believes that the proper forum for the United States Government to oppose such action, will be the hearing that the California State Board of Equalization will hold in Sacramento June 29, 1978. In this respect, there is a position developed by the Administration on a parallel case and embodied in the letter that on December 19, 1977 the General Counsel of the Office of the Special Representative for Trade Negotiations, Mr. Rich-

ard Rivers, addressed to Attorneys Sheldon Cohen and Peter Briger on the subject of foreign oceangoing containers taxed by local governmental units of the State of California. (copy of this letter is also attached).

Washington, D.C., June 15, 1978.

ENCLS.

COPY

The Netherlands Ambassador presents his compliments to the Honourable the Secretary of State and has the honor to draw Mr. Vance's attention to the following matter.

In view of a proposed amendment to the California tax regulations which would enable the State of California and the local county assessors of California to levy a personal property tax on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California, I may draw your attention to the following.

The Government of the Netherlands submits that the imposition of a property tax on aircraft owned by foreign airlines operating into and out of California would directly contravene the United States' treaty obligations set forth in article 24 of the Convention on International Civil Aviation (the so-called "Chicago Convention") and the United States' representations to the other contracting States of the Convention with respect to the exemption from property taxes on aircraft engaged in international air transportation as set forth in the supplement to ICAO document 8632-6/968.

The Government of the Netherlands invites the attention of the Department of State to the language of article 24 of the Chicago Convention which states that "aircraft on a flight to, from, or across territory of another contracting State are to be admitted temporarily free of duty . . . .". In the considered opinion of the Government of the Netherlands, the exemption from "duty" provided by the Convention must necessarily include an exemption from property taxes, whether attempted to be imposed by the United States of America itself or by any individual State or political subdivision thereof. If this were not so, the exemption from "duty" would have little practical value or meaning.

The attention of the Department of State is furthermore drawn to section iii of the ICAO "Council Resolution of 14 November 1966 on taxation of the income of international air transport enterprises and on taxation of aircraft," and particularly clause (1)(b) thereof, which states:

> "(1) *each contracting State shall,* to the fullest extent possible, *grant* reciprocally
>
> > (b) *exemption from property taxes,* and capital levies or other similar taxes, *on aircraft of other contracting States engaged in international air transport* . . ." (emphasis supplied).

In further accordance with this resolution, the Department of State is reminded that each contracting State, including the United States, was to notify ICAO of the extent to which it was prepared to take action in accordance with the principles of this Resolution. In this regard, the United States specifically and unequivocally represented to the other contracting States of ICAO that:

> "the United States in accord with the principles set forth in this clause and, in accordance with its existing laws, has for a long period of time followed the practice of granting the exemptions provided for in this clause through bilateral agreements with other countries, or, in appropriate cases, by means of administrative rulings".

The United States' statement then declared that such agreements have been concluded today with several countries. Thus, it is the opinion of the Government of the Netherlands that the United States has already committed itself to a practice of exempting aircraft under foreign flag and which are engaged in international air transportation from the levy of any property tax within the United States.

The Government of the Netherlands would also invite the Department of State's attention to the consideration of various policy factors which are necessarily germane to this issue. First, aircraft operating in international air transportation under the flag of the Netherlands are already subject to full taxation in the Netherlands. Thus, if a property tax were to be imposed by the United States or any individual State or political subdivision thereof, the aircraft would thus be doubly taxed. Such a tax burden is both unfair to the air transport enterprises involved and also a frustrating but preventable, impediment on the smooth development of trade and travel between our two countries. It is indeed the very purpose for which section iii of the ICAO Council Resolution of 14 November 1966 was formulated and approved.

Finally, it seems evident that the imposition of a property tax on the aircraft of non-US airlines operated to or from the United States of America in foreign commerce may lead to the taxation of aircraft of US airlines by foreign Governments and their local political subdivisions.

Once the United States abandons the principle of reciprocal exemption from property taxation of aircraft, there is little reason other Governments will have to refrain from imposing similar, retaliatory property taxes. No one stands to gain from such an escalation of trade barriers as would come about, least of all carriers of the United States which may find themselves with aircraft subject to property tax in many foreign jurisdictions.

The Government of the Netherlands is deeply concerned with the possible international complications which could result if the State of California were to impose a property tax on foreign aircraft operated in foreign commerce. The Government of the Netherlands urges the Government of the United States to take immediate and appropriate action to prevent the imposition of a property tax on foreign-

registered aircraft by the State of California in order to assure continued growth and development of trade and other relations between our two countries.

COPY

Washington, D.C.

June 9, 1978

The Embassy of New Zealand presents its compliments to the Department of State and has the honour to refer to the proposed amendment to the California tax regulations which would enable the State of California to levy a property tax on aircraft owned and operated by foreign airlines engaged in foreign commerce to and from the State of California.

Air New Zealand is designated by the Government of New Zealand to operate from New Zealand via certain intermediate points to Los Angeles, California, pursuant to the provisions of the 1964 New Zealand-United States Air Transport Agreement. Article 7 of that Agreement exempts, on the basis of reciprocity, essential support equipment from customs duties, excise taxes, inspection fees and other national duties or charges. The intent and spirit of this Article is "to prevent discriminatory practices and to assure equality of treatment . . ." and it is the belief of the New Zealand Government that the proposed tax is contrary to that spirit and intent. This would seem to be the view also of the United States Government when it advised ICAO of the extent to which it was prepared to take action in accordance with the principles of Section III of the ICAO Council resolution of 14 November 1966 on Taxation of the Income of International Air Transport Enterprices and on Taxation of Aircraft. That section *inter alia* urges contracting states to grant reciprocally, to the fullest extent "exemption from property taxes, and capital levies or other similar taxes on aircraft of other contracting states engaged in international air transport." The United States stated that it "in accord with the principles set forth in this clause and, in accordance with its existing laws, has for a long period of time followed the practice of granting the exemptions provided for in this clause through bilateral agreements with other countries . . ." The United States then included New Zealand in the list of countries with which it had concluded such agreements to grant the exemptions provided in Section III of this resolution, namely exemption *inter alia* of aircraft from property tax.

Furthermore, Article 24(A) of the Convention on International Civil Aviation 1944 specifically requires that aircraft of another contracting state "shall be admitted temporarily free of duty, subject to the customs regulations of the state". Both New Zealand and the United States are parties to the Convention and are bound to observe the obligations imposed by this Article regardless of whether local or national "duty" is involved. In New Zealand's view the word "duty" as used in Article 24(A) is sufficiently wide to cover the proposed property tax and the proviso relating to customs regulations refers only to administrative procedures such as "customs supervision" as is pointed out later on in the same paragraph. This view is confirmed by the 1966 Council resolution referred to above.

The New Zealand Government is concerned that if the State of California is permitted to impose the property tax on aircraft engaged in foreign commerce, the New Zealand Government will have no option but to consider taking appropriate action to ensure that its designated airline is not disadvantaged. The proposed action of the State of California could be responsible for a chain reaction that can only increase airline costs and inevitably lead to significant increases in the fares, rates, and charges for international travel by air between our two countries.

In view of all these considerations the New Zealand Government would appreciate clarification from the Government of the United States as to what action it proposes to take in respect of the property tax on foreign aircraft proposed by the State of California.

The Embassy of New Zealand avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Embassy of New Zealand,

WASHINGTON, D.C.

19 June, 1978

NOTE NO. 153

Her Britannic Majesty's Embassy presents its compliments to the Department of State and has the honour to refer to a circular letter from the California State Board of Equalization dated 24 March 1978 which gives notice of a proposed amendment to the California Tax Regulations. This proposal is intended to enable the State of California and the local county assessors of California to levy property tax ("The Proposed Tax") on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California.

The Proposed Tax falls within the scope of Article 8(5) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning Air Services signed at Bermuda on 23 July 1977, as amended. The Proposed Tax would be a tax imposed by State and local authorities on aircraft operated in international air services by the designated airlines of the United Kingdom and it would not be based on the cost of any services provided. Her Majesty's Government therefore calls on the United States Government to use its best efforts to secure exemption from The Proposed Tax for the designated airlines of the United Kingdom.

In addition, Her Majesty's Government maintain that the imposition on The Proposed Tax would be in contravention of Article 24 of the Convention on International Civil Aviation (the "Chicago Convention") to which the Governments of the United Kingdom and the United States are parties. Article 24 requires aircraft of other Contracting Parties to be admitted temporarily free of duty. This provision must be taken to include exemption from any form of taxation whether levied at the national or state level.

Her Majesty's Government would also draw to the attention of the United States Government Section III of the ICAO Council Resolution of 14 November 1966 on taxa-

tion of the income of international air transport enterprises and the taxation of aircraft. Under Paragraph 1(B) of this Section Contracting States are required reciprocally to grant exemption from property taxes on aircraft of other Contracting States engaged in international air transport. The United States Government has represented to the other Contracting States of ICAO that it "has for a long period of time followed the practice of granting . . . through bilateral agreements with other countries or, in appropriate cases, by means of administrative rulings . . . the exemptions provided for" in this Section.

Her Majesty's Government is concerned that if the State of California is permitted to take this action other States may follow suit and that there may be proliferation within the United States of similar local taxes on their designated airlines. No comparable tax is imposed on aircraft of United States designated airlines by any authority within the United Kingdom. Imposition of The Proposed Tax would therefore alter the present position of reciprocity and would lead to an element of double taxation of United Kingdom designated airlines which would disturb the equilibrium of existing and proposed double taxation agreements between our two countries.

In the light of these considerations, Her Majesty's Government would be grateful if they could be informed of what action the United States Government is taking to prevent imposition of a property tax on foreign aircraft by the State of California.

The Embassy avails itself of this opportunity to renew the assurances of its highest consideration.

BRITISH EMBASSY
WASHINGTON, D.C.

7 June 1978

Appendix III

APPENDIX III

Doc 8632-C/968

ICAO'S POLICIES OF TAXATION IN THE FIELD OF INTERNATIONAL AIR TRANSPORT

Approved by the Council on 14 November 1966.
Published by direction of the Council.

November 1966

INTERNATIONAL CIVIL AVIATION ORGANIZATION

FOREWORD

The Fifteenth Session of the ICAO Assembly (Montreal, June/July 1965) adopted Resolution A15-16 as follows:

> "WHEREAS it is important that every effort be made to facilitate the operation of international air services as far as different kinds of taxation are concerned;
>
> THE ASSEMBLY RESOLVES that, in carrying out the work programme of the Organization in the air transport field, the Council shall review the compliance with its resolutions and recommendations dealing with the problems of the avoidance of multiple taxation and explore, if necessary, on the basis of the latest information from the Contracting States the possibility of a new initiative in this field."

During the 56th Session, the Council requested the Air Transport Committee to review the above mentioned 1951 Resolutions/Recommendations and the status of their implementation in the light of the latest information from Contracting States, and to make appropriate recommendations to Council on taxation in the field of international

air transport. The 1951 Resolutions/Recommendation dealt with:

i) taxation of fuel, lubricants and other consumable technical supplies when an aircraft registered in one State arrives in or departs from a customs territory of another State;

ii) taxation of fuel, lubricants and other consumable technical supplies consumed between two or more landing points within the same customs territory;

iii) taxation of the income and flight equipment of international air transport enterprises;

iv) taxes related to the sale or use of international air transport.

Accordingly, the Committee during the 58th and 59th Sessions of Council, undertook a comprehensive review of all aspects related to this subject matter.

Acting on the Committee's resultant recommendations, the Council, at the fourth meeting of its 59th Session, on 14 November 1966, decided to re-cast the Resolutions and the Recommendations, taking into account developments since 1951, while reaffirming at the same time their underlying principles, to publish them in this policy document for action by Contracting States and to provide certain explanatory material herein for guidance to States and international operators.

SECTION III

COUNCIL RESOLUTION OF 14 NOVEMBER 1966 ON TAXATION OF THE INCOME OF INTERNATIONAL AIR TRANSPORT ENTERPRISES AND ON TAXATION OF AIRCRAFT

WHEREAS multiple taxation of the earnings of international air transport enterprises and of aircraft engaged in international air transport can be effectively prevented

by the reciprocal agreement of States to limit taxation in these two fields to the State in which any such enterprise has its fiscal domicile; and

WHEREAS for international air transport enterprises lack of implementation of this rule of reciprocal exemption involves either multiple taxation or considerable difficulties of income allocation in a very large number of taxing jurisdictions; and

WHEREAS such exemptions have already been widely obtained, for example, through the inclusion of appropriate provisions in bilateral agreements aimed at avoidance of multiple taxation generally or in those dealing with the exchange of commercial air transport rights or through individual States adopting legislation which grants the exemption to any other States that provide reciprocity;

THE COUNCIL RESOLVES THAT:

(1) Each Contracting State shall, to the fullest possible extent, grant reciprocally

(a) exemption from taxation on the income of air transport enterprises of other Contracting States derived in that State from the operation of aircraft in international air transport; and

(b) exemption from property taxes, and capital levies or other similar taxes, on aircraft of other Contracting States engaged in international air transport;

(2) Each Contracting State shall endeavour to give effect to paragraph (1) above, by the bilateral negotiation of agreements relating to double taxation generally, or by such other methods as the inclusion of appropriate provisions in bilateral agreements for the exchange of commercial air transport rights, or by legislation granting such exemption to any other State that provides reciprocity;

(3) Each Contracting State shall take all feasible measures to avoid delays in any bilateral negotiations found necessary to achieve implementation of Clause (1) above;

(4) Each Contracting State shall notify the Organization of the extent to which it is prepared to take action in accordance with the principles of this Resolution and thereafter keep the Organization informed of any subsequent changes in its position vis-a-vis the Resolution;

(5) The information thus received shall be published and transmitted to all Contracting States.

COMMENTARY ON COUNCIL RESOLUTION IN SECTION III

21. This Resolution aims at the avoidance of multiple taxation in so far as it affects the earnings of and the fleet engaged in international air transport, e. g., income taxes on profits, and movable property or similar taxes on aircraft. The Council, for reasons similar to those given in the foregoing Resolution and Recommendation on taxation of fuel, lubricants and other consumable technical supplies, based the Resolution upon the principle of reciprocity. This approach appeared to offer the best prospect of general acceptance, has been widely applied to international shipping for many years, and has already been put into effect in many instances either through appropriate legislation in individual States or through bilateral agreements of one sort or another between States.

22. It will be noted in this connection that the conclusion of such agreements is consistent with the recommendation of the Economic and Social Council of the United Nations to the effect that governments should actively pursue a policy of negotiating agreements with each other for the avoidance of multiple taxation.

23. Furthermore, both this reciprocal approach and the method used for avoidance of multiple taxation for the items under consideration have been contained in model bilateral conventions, e. g., those of Mexico (1943) and London (1946), in which tax experts from large and small, developed and developing States participated. It was recognized by those who developed these model tax agreements that international water and air transport enterprises were essentially different from other types of business enterprises which do not generally operate with great mobility in a multiplicity of jurisdictions and on or above the high seas.

24. The Resolution. when fully implemented by all Contracting States, would mean that taxes on the earnings and fleet of an international air transport enterprise would be levied solely by the State where the place of effective management of the enterprise is located. In the absence of reciprocal exemptions, an international air transport enterprise is either subject to multiple taxation—a situation which this Resolution endeavours to prevent—or to assessments on the basis of one or the other allocation formula to be negotiated between the operator and the State concerned. The only possible alternative, i. e., allocation on a multilateral basis, in Council's view, remains a theory which conceivably might be more equitable provided every State in the world would agree to commit itself to the formula devised. This appears precluded in the foreseeable future by: a) fundamental differences between jurisdictions, in tax structure, revenue needs and economic conditions, as well as by differences in language, business and accounting practices and fiscal and commercial legislation, and (b) the freely admitted desire of the operators of international flights, in cases where the rule of reciprocal exemption is not followed with respect to taxes on their income or movable property taxes on their aircraft, to maintain flexibility by utilizing different formulae in different circumstances.

25. In giving effect to this Resolution, various courses of action, as mentioned in the third WHEREAS clause, are open to Contracting States. Of these, the adoption of legislation granting exemption on a reciprocal basis, is undoubtedly the most simple and least time consuming method of achieving the aim of this Resolution, provided that such legislation can be enacted without undue delays. Some States, on the other hand, find it more practicable to deal with the problem of relief from multiple taxation of air transport enterprises through formal bilateral negotiations of agreements relating to taxation generally or in the context of agreements for the exchange of commercial air transport rights. In some instances, however, negotiations conducted between certain States to this end are known to have encountered numerous formal difficulties and delays, as a result of which Council has invited (cf. third resolving clause) negotiating governments to take all feasible measures to achieve rapid implementation. In this connection, the attention of governments is drawn to a method of implementation that has been utilized between certain States. Having decided, in principle, to apply the rule of reciprocal exemption to each others' air transport enterprises, the States concerned have completed action on the matter by means of a simple exchange of diplomatic notes. A wider application of this type of action, where possible and appropriate, might assist in the early achievement of more universal application of the rule of reciprocal exemption.

26. As in the previous Resolution and Recommendation on fuel and lubricants, the Council again has urged States (cf. Resolving Clauses (4) and (5) to notify the Organization of their position vis-a-vis items a) and b) on the first resolving clause so that an up-to-date record may be maintained in a Supplement to this document.

SUPPLEMENT TO DOC 8632-C/968
ICAO'S POLICIES ON TAXATION IN THE FIELD OF INTERNATIONAL AIR TRANSPORT

Information reflecting the status of implementation in Contracting States of Council's 1966 Taxation Resolutions and Recommendation as notified to ICAO.

Approved by the Council and published by its decision

Incorporating all the information relating to Doc 8632-C/968 as notified to ICAO up to the date shown in the Table of Contents.

1967

INTERNATIONAL CIVIL AVIATION ORGANIZATION

REPLY OF THE UNITED STATES

Section III, Resolution

Clause (1) The United States is in accord with the principles set forth in this Clause and, in accordance with its existing laws, has for a long period of time followed the practice of granting the exemptions provided for in this Clause through bilateral agreements with other countries, or, in appropriate cases, by means of administrative rulings.

Clause (2) Such agreements have been concluded to date with the following countries:

Antigua; Argentina; Australia; Austria; Barbados; Belgium; Brazil; Canada; Colombia; Congo; Democratic Republic of Curacao; Denmark; Finland; France; Germany, Fed. Rep. of; Ghana; Greece; Honduras; Iceland; Indonesia; Iran; Ireland; Italy; Jamaica; Japan; Kenya; Lebanon; Liberia; Luxembourg; Mexico; Netherlands, Kingdom of the; New Zealand; Nigeria; Norway; Pakistan; South Africa; Spain; Sweden; Switzerland; Syria; United Arab Republic; United Kingdom; Uruguay.